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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 187

EARL R. DEEN, *Petitioner,*

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent.*

REPLY OF PETITIONER TO RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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August 28, 1958

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I. INTRODUCTION

There is no escape from the conclusion expressed on page 8 of Deen's Petition for Certiorari that The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States, which directed the Court of Civil Appeals of Texas:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury,"

and to proceed "in conformity with the judgment and decree of this Court above stated * * *." since The Supreme

Court of Texas directed the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury and directed the Court of Civil Appeals to inquire into this question on its own evaluation of the evidence and irrespective of the mandate of the Supreme Court of the United States. Respondent has not and cannot answer this issue although his reply consists of forty-two pages and the citation of some one hundred and two authorities. How does respondent attempt to meet the above issue:

(1) by questioning jurisdiction;

(2) by denying that The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States.

II. JURISDICTION

Respondent attacks jurisdiction on two grounds:

(1) the judgment of The Supreme Court of Texas is not final;

(2) if petitioner is entitled to certiorari his petition should be directed to the Court of Civil Appeals of Texas rather than to The Supreme Court of Texas.

The Finality of the Judgment

Respondent argues at great length and cites many authorities to the effect that a writ of certiorari will only lie

where the highest court of the state has rendered a final judgment. That is not the issue before this Court. The issue is whether a judgment of The Supreme Court of Texas that finally disposes of all matters left open by the mandate of the Supreme Court of the United States is nevertheless not final because The Supreme Court of Texas directs a lower court to inquire further into a question already finally decided by the Supreme Court of the United States. It appears to petitioner that it is the final adjudication by The Supreme Court of Texas of all issues left open by the mandate of the Supreme Court of the United States that constitutes the final judgment irrespective of the form in which The Supreme Court of Texas writes its judgment (See Petition for Certiorari, p. 7 for authorities). After The Supreme Court of Texas finally adjudicated all questions left open by the mandate of the Supreme Court of the United States its judicial discretion terminated. Thereafter, nothing remained for The Supreme Court of Texas but the performance of the ministerial act of rendering judgment for Deen in the principal sum of $15,950.00, with interest and costs, and the execution of the mandate of this Court. Deen does not concede that the Texas appellate courts had a right to take away from him a part of the damages awarded him by the jury, under other decisions of this Court, but says that the mandate in this case did not preclude the Texas Courts from deciding this question in the first instance. Deen had already clearly indicated that if it be finally decided that he was not entitled to judgment

in the principal sum of $21,450.00, as given him by the jury and the trial court, he would accept the $15,950.00 rather than be subjected to further proceedings in the Texas courts.

The Supreme Court of the United States is certainly not powerless to enforce its own mandate and enforce it at the very moment no further proceedings can be had in the state courts, without violating that mandate. Deen hopes that since he cannot present the damages issue in a mandamus proceeding that the Court will grant the Writ of Certiorari as the appropriate remedy or will grant both the writs of mandamus and certiorari.

WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DIRECTED TO THE COURT OF CIVIL APPEALS

This is the second ground advanced by Respondent. It says in effect that Deen should have let the Court of Civil Appeals again inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence and if he did not like that court's decision apply for a writ of certiorari from that court. Deen respectfully asks the Court to consider his Reply to Respondent's Reply to the Petition for Writ of Mandamus on this point. Respondent further suggests that even if the Court of Civil Appeals reversed the case on the evidence point that Deen would not be hurt because, if Deen is right, ultimately the Supreme Court of the United States would enforce its mandate. But

Deen does not want to be like the little boy described by Dickens in Bleak House. The little fellow was promised a hobby horse when the lawsuit was settled. He grew to manhood, went off to war, acquired a real horse and trotted off to another world, and the lawsuit continued.

In our Reply to Respondent's Reply to the Petition for Writ of Mandamus (pages 17-18), petitioner has answered the argument set out on pages 9-10 of Respondent's Reply to Certiorari that petitioner has made wild statements about what a trial court would do in case of another jury's finding in favor of Deen on the same evidence, in view of The Texas Supreme Court and the Court of Civil Appeals holding there is no evidence to support a verdict in favor of Deen and in view of the second decision of The Supreme Court of Texas that "no evidence" includes the lesser finding of "insufficient evidence."

III. ON THE MERITS

Pages 15 to 28 of Respondent's Reply consists of denials of alleged statements of Deen, some of which were not made by petitioner at all, others of which have been distorted. Petitioner will answer these misrepresentations and distortions in the order presented by respondent.

1. The first misrepresentation is:

> "Deen's statement that the setting aside of a jury's verdict because same is against the overwhelming weight and preponderance of the evidence and ordering a new trial is a denial of his right of trial by jury is not correct" (Reply, p. 15).

Deen has made no such statement. Deen does say that The Supreme Court of Texas violated the mandate of the Supreme Court of the United States when The Supreme Court of Texas directed the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence when the Supreme Court of the United States had said:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury."

Petitioner further contends that the Court of Civil Appeals and The Supreme Court of Texas were not justified in taking away a part of the damages awarded him by the jury and the trial court where the undisputed proofs justified with reason the jury's conclusion on this issue.

2. The second misrepresentation by the respondent is:

> "Deen's statement that a finding by an appellate court that there was enough evidence to require the submission of an issue to the jury is the same thing as a holding by an appellate court that the verdict is not against the overwhelming weight and preponderance of the evidence is without support in either principle or authority." (Reply, p. 18.)

Deen made no such statement. Deen does say that when the Supreme Court of the United States held his proofs justified with reason the jury's conclusion that employer negligence played a part in producing his injury, that his evidence met the test for recovery under FELA and no other Court can further inquire into this question or prescribe a different test for recovery, or grant a new trial on this evi-

dence point, or even grant a new trial on newly discovered evidence pertaining to this point finally decided by the Supreme Court of the United States.

3. The third misrepresentation of respondent is:

> "Deen's statement that the question of overwhelming weight and preponderance of the evidence was involved in the former petition for certiorari which was granted in this Court is not correct." (Respondent's Reply, p. 19.)

Deen made no such statement. The Supreme Court of Texas and the respondent have tried so hard to show it was Deen's omission that has prevented them from obeying the mandate of this Honorable Court, petitioner will quote exactly the Question Presented in his Petition for Certiorari:

> "The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues of a jury in favor of the railway and disregarding all issues found by a jury in favor of the injured employee, and by reading into a verdict something that is not there, and in setting aside a judgment of a trial court rendered in favor of the injured employee on the verdict of the jury has deprived the injured employee of the right of trial by jury given him under a Federal statute generally known as the Federal Employers Liability Act." (Original Petition for Certiorari, pp. 9-10.)

This was the question on which the certiorari was granted and this was the question decided when the cause was reversed and the Supreme Court of the United States held the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury. Now if The Supreme Court of Texas and respond-

ent want to split the above question and holding up into "no evidence," "enough evidence," "sufficient evidence," "insufficient evidence," "scintilla of evidence," and "overwhelming weight and preponderance of the evidence" fragments, petitioner canot help it. All petitioner knows is the Supreme Court of the United States has held his proofs have met the test for recovery under FELA.

4. The fourth misrepresentation of the respondent is:

> "Deen's statement that a trial of a Federal Employers' Liability case in the state court is not governed by state rules of practice is not correct." (Reply, p. 22.)

Deen made no such statement. Deen did say:

> "Underlying the whole opinion of the Supreme Court of Texas is the final false assumption that the Federal Employers Liability Act and decisions of this Court are enforceable in Texas state courts only to the extent that Texas practice permits such enforcement."

When petitioner's position in the petition for certiorari is considered as a whole, it is obvious that his contention is that substantive federal rights given federal employers by the Congress under FELA cannot be destroyed by state courts under the guise of local practice. Respondent fully understands the purport of the decisions of the Supreme Court of the United States on this question as evidenced by the following words:

> "This Court has never overruled Dickinson v. Stiles, although it has held that some particular rule of practice destroyed the rights of a plaintiff under the Federal Employers Liability Act, and hence was unenforceable." (Respondent's Reply to Certiorari, p. 23.)

One rule of local practice that the Supreme Court of the United States has been extremely zealous in holding unenforceable, as destroying federal substantive rights, is that which leaves to the state court's decision the amount of evidence necessary to make a jury case under FELA. The Supreme Court of the United States has held the Federal Employers Liability Act is to have uniform application throughout the country unaffected by "local views of common law rules." "This uniformity extends to the type of proof necessary for judgment." *Garrett v. Moore-McCormick (1942), 317 U. S. 239, 63 S. Ct. 246.*

Chicago M. & St. P. Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 S. Ct. 564, 565.

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recover. The kind or amount of evidence required to establish it is not subject to the control of the several states."

See also *Brady v. Southern R. Co. (1943), 320 U. S. 476, 64 S. Ct. 232* and *Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692.*

In

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226,

The Supreme Court of Texas in discussing the *Deen* case stated the above rule in these words:

> "In an action under the Federal Employers Liability Act, the question of what constitutes negligence

> and the sufficiency of the evidence to raise that question for the jury is to be determined by the applicable federal decision."

So is it not true that The Supreme Court of Texas, respondent and petitioner are in complete harmony on this point?

5. The fifth misrepresentation by respondent is:

> "Deen's statement that the Court of Civil Appeals in Texas has no jurisdiction to require remittitur in a FELA case and that the only court having jurisdiction to grant or require remittitur in a FELA case is the United States Supreme Court (Petition for Certiorari, p. 25, et seq.) is not correct." (Respondent's Reply, p. 25.)

Deen made no such statement. Deen's position is fully set out in his petition for certiorari, pages 25-33. Briefly, it is that undisputed evidence justified with reason the jury's conclusion that $39,000.00 will reasonably compensate Deen for his injuries but that his recovery should be reduced $17,550.00, or 45%, because of his own negligence. The trial court accepted the jury verdict and rendered judgment in favor of Deen for the principal sum of $21,450.00, the difference in the two figures above. What the Court of Civil Appeals did is not too clear from the record but it ended up rendering judgment for $12,050.00 more than the jury and the trial court gave Deen in the first place. The Supreme Court of Texas construed the Court of Civil Appeals' action as intending to reduce Deen's recovery in the principal sum of $21,450.00 by $5500.00, allowing him a recovery in the principal sum of $15,950.00.

Deen says this action of the Court of Civil Appeals and The Supreme Court of Texas deprived him of a jury trial on damages contrary to the provisions of FELA. That it is only where the proofs do not support with reason the jury's conclusion on damages that a state court in a FELA case would be justified in setting aside such damages in whole or in part.

6. The sixth misrepresentation of the respondent is:

> "Deen's statement that certiorari to the present judgment of The Supreme Court of Texas is indispensable to the protection of his rights is not correct." (Respondent's Reply, p. 26.)

Deen made no such statement. Deen is willing to make that statement at this time, if it will help respondent present his argument. Briefly, Deen's position is that no further proceedings of any kind can now be had in the Texas courts without violating the mandate of this Court. That the Supreme Court of the United States has the power and the duty at this time to enforce its mandate. If The Supreme Court of Texas can prevent the enforcement of the mandate of this Honorable Court by reversing and remanding the cause for further proceedings in any lower court, trial or appellate, in violation of the mandate, then The Supreme Court of Texas has the power to prevent forever the enforcement of the mandate. Suppose Deen patiently returned to the trial court on respondent's theory that he can win but he cannot lose and after a lapse of another four or five years returns to The Supreme Court of Texas. Suppose

The Supreme Court of Texas again reverses and remands the cause to a lower court. Respondent's argument would still apply. Respondent would have to say Deen must return to the trial court a third time because he can win but cannot lose. Deen's position is the enforcement of the mandate of the Supreme Court of the United States at this time is essential for the protection of his rights. Deen agrees with respondent that delay does not make just what is unjust but delay should not be used to defeat a just claim.

7. The seventh misrepresentation made by the respondent, though this misrepresentation is not made in a numbered paragraph, is:

> "Deen construes the mandate of the United States Supreme Court as being the equivalent of an order to the Court of Civil Appeals to affirm the judgment of the trial court." (Reply, p. 29.)

Deen placed no such construction on the mandate and the respondent knew at the time of making the above statement that Dean did not so construe the mandate. Eight pages later in respondent's same reply it correctly and accurately states Deen's contention in Deen's exact words:

> "While the mandate of the Supreme Court of the United States did not leave open for further examination by the state court the sufficiency of the evidence to support the jury's conclusion of employer's negligence, it did leave open certain other questions, all of which have been decided." (Respondent's Reply, p. 37.)

The climax came on page 37 of Respondent's Reply where respondent belabors petitioner for being inconsistent be-

cause the position on the above point, which respondent charges petitioner with taking, which he did not take, conflicts with the position which petitioner did take.

All the authorities and argument, on pages 29-38 of Respondent's Reply, to the effect that state courts on remand may pass on questions not encompassed in the mandate of the Supreme Court of the United States, all of which petitioner concedes, are not in point on the questions before the Court on the petitions for certiorari and mandamus. What respondent needs are some authorities that hold that after the Supreme Court of the United States has instructed the Court of Civil Appeals in its mandate:

> "We hold the proof justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury,"

that The Supreme Court of Texas may instruct the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury, on its own evaluation of the evidence and wholly apart from the mandate of the Supreme Court of the United States.

Petitioner cannot agree with respondent's statement on page 39 of Respondent's Reply that the writ of certiorari should be denied because no "substantial federal question" is involved. The denial of the right of trial by jury given federal employees by Congress under FELA and the construction of the mandate of the Supreme Court of the United States are indubitably federal questions.

WHEREFORE, petitioner prays as he has heretofore prayed and for general relief.

Respectfully submitted,

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August 28, 1958

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply of Petitioner to Respondent's Reply to Petition for Writ of Certiorari has been mailed on the 29th day of August, 1958, to the Respondent's attorneys as follows: To Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

ROBERT LEEE GUTHRIE

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